UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

MEMORANDUM OPINION AND ORDER

Crim. No. 15-49 (MJD/FLN)

Hamza Naj Ahmed (01),
Mohamed Abdihamid Farah (02),
Adnan Abdihamid Farah (03),
Abdirahman Yasin Daud (04), and
Guled Ali Omar (07),

Defendants.

John Docherty and Andrew Winter, Assistant United States Attorneys, Counsel for Plaintiff.

JaneAnne Murray, Murray Law LLC, Counsel for Defendant Hamza Ahmed.

Murad M. Mohamud, Murad Defense P.A., and P. Chinedu Nwaneri, Nwaneri Law Firm, PLLC, Counsel for Defendant Mohamed Farah.

Kenneth U. Udoibok, Kenneth Ubong Udoibok, P.A., Counsel for Defendant Adnan Farah.

Bruce D. Nestor, De Leon & Nestor, LLC, Counsel for Defendant Abdirahman Daud.

Glenn P. Bruder, Mitchell, Bruder & Johnson, Counsel for Defendant Guled Omar.

This matter is before the Court on the defendants' pretrial motions based on the Second Superseding Indictment (hereinafter "Indictment"). **Although the Court will issue its Order on the pending motions herein, the hearing set for Thursday, February 11, 2016 will proceed as scheduled.**

SUMMARY

As discussed in detail below, the Court will deny the defendants' motions to dismiss Count 1 of the Indictment based on arguments that ISIL engages in lawful combat and that its members are entitled to the protections afforded lawful combatants. The Indictment makes clear that defendants are charged with conspiring with ISIL, a designated foreign terrorist organization, to commit murder. As a result, defendants are being prosecuted only for unlawful acts, not acts that may fall within combatant immunity.

I. Joint Motion to Dismiss Count 1 Based on Combatant Immunity Doctrine.

Defendants seek dismissal of Count 1 based on the doctrine of combatant immunity. This doctrine has long been recognized under common law and is rooted in the customary international laws of war, forbidding prosecution of soldiers for lawful belligerent acts committed during war. United States v.

Lindh, 212 F. Supp.2d 541, 553 (E.D. Va. 2002). "Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict." Id. See also, United States v. Khadr, 717 F. Supp. 2d 1215, 1220 (C.M.C.R. 2007) ("The determination of whether an individual captured on the battlefield is a 'lawful' or 'unlawful' enemy combatant carries with it significant legal consequences (both international and domestic) relating to the treatment owed that individual upon capture and ultimate criminal liability for participating in war-related activities associated with the armed conflict"); Lindh, 212 F. Supp.2d at 553 (finding that "it is generally accepted that this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants").

The combatant immunity doctrine is also an integral part of the Geneva Conventions. United States v. Hamidullin, __ F. Supp.3d __, 2015 WL 4241397, at *14 (E.D. Va. Jul. 13, 2015). Because the United States is a party to the Geneva Conventions, its provisions have the force of federal law under the Supremacy Clause. Id.

The Geneva Convention Relative to the Treatment of Prisoners of War ("GPW III") applies to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GPW III, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Art. 2. With respect to such conflicts, GPW III provides protections for prisoners of war, who prior to capture, were considered to be lawful combatants. Lawful combatants under GPW III generally include those individuals that are members of the armed forces of a party to the conflict, including members of militias or volunteer corps forming part of the armed forces or members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining party. GPW III, Art. 4 (A)(1) and (3). Lawful combatants also include members of other militia, volunteer corps and organized resistance movements that fulfill the following four conditions: I) they are under the command of an individual who is responsible for their subordinates; ii) they wear a fixed distinctive sign or symbol recognizable at a distance; iii) they carry their arms openly; and iv) they conduct their operations in accordance with the laws and customs of war. Id. Art. 4(A)(2).

Under the GPW III, lawful combatants "may not be sentenced by the military authority and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." Id. Art. 87.

As alleged fighters with ISIL, defendants argue they are entitled to combatant status because they can be considered members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" GPW III, Art. 4(A)(3). Defendants also argue their lawful combatant status is based on membership "of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces." Id., Art. 4(A)(1). Finally, defendants argue their combatant status emanates from membership in a volunteer corps that meets the following conditions: ISIL has an army with a rigid command structure, it is equipped with insignia, weapons and military vehicles, and although it may have engaged in gross atrocities against civilians, it also engages in conventional military warfare through a centralized structure. Id., Art. 4 (A)(2).

The government asserts that defendants are not entitled to combatant immunity because the Syrian conflict is a non-international armed conflict for which combatant immunity does not apply. Defendants argue that while the Syrian conflict may have begun as a non-international armed conflict, it has since evolved into an international one. The Court need not decide this issue, however, because even assuming the Syrian conflict is an international armed conflict, defendants have failed to demonstrate that they are entitled to combatant immunity.

It is the defendants' burden to establish that they are entitled to lawful combatant immunity. Lindh, 212 F. Supp.2d at 557. Based on the record before it, the Court finds that defendants have not met this burden as they have not demonstrated that ISIL meets any of the criteria set forth in Article 4 that would extend them lawful combatant status.

There is no evidence in the record that ISIL is the armed force of a Party to the Syrian conflict, or a regular armed force that has professed allegiance to a government or authority not recognized by the United States. Further, the Court finds that defendants have not demonstrated that ISIL meets the criteria set forth in Article 4 (A)(2) as there is no evidence in the record that ISIL is commanded by a person responsible for subordinates, that it has a distinctive sign recognizable at a distance, and that all members of ISIL openly carry arms. Most importantly, however, the Court finds that defendants have not demonstrated that ISIL routinely conducts its operations in accordance with the laws and customs of war - a fact that defendants concede in their motion. (Defendants' Joint Memorandum in Support of Motion to Dismiss [Doc. No. 354] at p. 10.)

First, it has been reported that ISIL does not treat prisoners of war in accordance with the GPW III. See Terrence McCoy and Adam Taylor, Islamic State says immolation was justified; experts on Islam say no, The Washington Post, February 4, 2015 (reporting on video that depicted brutal immolation of a Jordanian pilot by the Islamic State). It has also been widely reported that ISIL treats civilians horrifically - beheading them in grisly, public spectacles and later disseminating video of these horrific murders for propaganda purposes. See Rukmini Callimachi, ISIS Video Purports to Show Beheading of James Foley, The N.Y. Times, August 19, 2014. It has also been reported that ISIL carried out over 3,000 executions of civilians in Syria by beheading, stoning, crucifixion or throwing them from buildings. Laura King and Habih Bulos, In a Grisly First, Islamic State Beheads 2 Women in Syria, Monitor Says, The Los Angeles Times, June 30, 2015. ISIL also uses mass rape of the civilian population as both an instrument of control and as a recruiting tool. See Rukmini Callimachi, ISIS

Enshrines a Theology of Rape, The N.Y. Times, August 13, 2015.

Defendants argue that there is substantial evidence and scholarship that acknowledges that ISIL has become more than a terrorist organization. See CNSNews.com/news/article/penny-starr/state-dept-official-isis-no-longer-terrorist-group-full-blown-army; Boaz Ganor, Four Questions on Isis: A "Trend" Analysis of the Islamic State, Perspective on Terrorism, June 2015 at 58; Audrey Kurth Cronin, Isis Is Not a Terrorist Organization, Foreign Affairs, March/April 2015; Rebecca Collard, What We Have Learned Since ISIS Declared a Caliphate One Year Ago, Time Magazine, June 25, 2015.

Even if that were true, that ISIL has become more than a terrorist organization, the fact remains that ISIL **is** a designated a foreign terrorist organization and defendants are charged in the Indictment with conspiring with ISIL to commit murder in the context of terrorist activities. Under these circumstances, combatant immunity does not apply.

Defendants also argue they are entitled to combatant immunity under common law, which is recognized thereunder as a variant of the public authority doctrine. In support, defendants attempt to distinguish this case from the Hamidullin decision in which the court declined to apply the public authority defense to an accused member of the Taliban, because there was no evidence that the defendant was operating under national military authority during a state of war and in accordance with the principles of civilized warfare, and because the Taliban was not a government recognized by the United States or even a *de facto* government. Hamidullin, 2015 WL 4241397 at *16. Defendants' attempt fails, however, as defendants have presented no evidence that they were operating under a public or governmental authority in accordance with the principles of civilized warfare or that the United States recognized ISIL as a government or *de facto* government.

II. Joint Motion to Dismiss Count 1 of the Second Superseding Indictment ("Indictment") - Violation of the Due Process Clause of the Fifth Amendment.

By this motion, defendants seek an order dismissing Count 1 of the Indictment on the grounds that 1) it fails to state an offense; and 2) as applied to the alleged conduct of an agreement to engage in fighting in the civil war in Syria, the Indictment fails to provide sufficient notice of what conduct is prohibited under 18 U.S.C. § 956(a).

A. Standard of Review

An indictment is legally sufficient if it contains all elements of the offense charged, fairly informs the defendant of the charges against him and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. United States v. Steffen, 687 F.3d 1104, 1109 (8th Cir. 2012). "An indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted." United States v. Sewell, 513 F.3d 820, 821 (8th Cir. 2008). "An indictment is normally sufficient if its language tracks the statutory language." Id.

On a motion to dismiss pursuant to Rule 12 of the Federal Rules of Criminal Procedure, the court must take as true the factual allegations in the indictment. Boyce Motor Lines v. United States, 342 U.S. 337, 343, n. 16 (1952).

B. Whether Count 1 Reaches Conduct That is Not Prohibited Under a Constitutional Interpretation of 18 U.S.C. § 956(a).

Count 1 alleges that during approximately March 1, 2014 through April 19, 2015, defendants "willfully conspired, combined, confederated, and agreed with each other, and with others known and unknown to the grand jury, to murder a person or persons outside the United States, and at least one member of the conspiracy committed at least one act within the United States in furtherance of the conspiracy and to effect the object thereof, . . . " Indictment ¶ 3. The

Indictment thereafter alleges thirty-two overt acts, when read together, provide a comprehensive description of the conspiracy alleged. Id. ¶ 3(a)-(ff). The Indictment alleges that these acts violated 18 U.S.C. §§ 956(a) and 2.

The elements of the charged conspiracy are 1) an agreement to engage in criminal activity; 2) one or more overt acts taken to implement the agreement; and 3) intent to commit the substantive offense. United States v. Chhun, 744 F.3d 1110, 1117 (9th Cir. 2014). The substantive offense alleged in Count 1 is murder, which is defined in 18 U.S.C. § 1111(a) as:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
> Any other murder is murder in the second degree.

One of the overt acts listed is that defendants "met and discussed ways in which to travel to Syria to join, and fight with, ISIL." (Indictment ¶ 3 (a).) Defendants argue that "fighting" is not synonymous with murder and the Indictment does not define "fight" to include murder. Even if the Indictment were limited to acts of killing, defendants argue the Indictment could reach unlawful killing as well as lawful killing on the battlefield.

Further, defendants argue the Indictment does not allege that they had the specific intent to engage in "fighting" as "unlawful combatants." Thus, the Indictment's use of the generic term "fighting," without more, necessarily includes the potential that the grand jury indicted them for an agreement which did not include the intent to commit an unlawful killing. As a result, defendants argue the Indictment is not properly framed to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury. United States v. Pirro, 212 F.3d 86, 92 (2nd Cir. 2000). Due process requires that no one may be charged under a law so vague that it fails to give people proper notice of the conduct it punishes or so standard-less that it invites arbitrary enforcement. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).

The Court finds these arguments have no merit. The **charging** language of Count 1 tracks the language of § 956 (a); charging defendants with conspiring to murder persons outside the United States. The term "fighting" is included in the section listing the overt acts taken in furtherance of a conspiracy to murder. As such, it is clear that the defendants could only be convicted of a conspiracy to commit an lawful killing.

Accordingly, the Court finds that the Indictment provides defendants sufficient notice of the offenses of which they are charged and "alleges sufficient information to allow [them] to plead a conviction or acquittal as a bar to a subsequent prosecution." Steffen, 687 F.3d at 1109.

C. Whether Count 1 Offends Basic Sense of Justice When the United States Funds and Supports Identical Conduct of Fighting in Syria.

Defendants next argue that the Fifth Amendment prohibits the United States from depriving them of their liberty and property without due process of law, and that the process due must protect the fundamental principles of liberty and justice. Twining v. New Jersey, 211 U.S. 78, 106 (1908). Due process means fundamental fairness. Ham v. South Carolina, 409 U.S. 484, 494-95 (1973).

By this motion defendants do not argue that prosecution under 18 U.S.C. § 2339B violates due process. Defendants concede that the United States government may designate some groups to be a designated foreign terrorist organization ("FTO") while providing weapons, training and support to other groups which engage in identical acts to those of an FTO.

Defendants do challenge, as arbitrary and contrary to fundamental principles of justice, the politicization of the judicial and legal definition of murder, such that only groups arbitrarily selected by the United States commit murder in the course of "fighting" while other groups that engage in the same conduct do not. Whether a killing committed during the course of fighting is unlawful and with malice aforethought cannot be solely dependent on whether the killing is committed by a person belonging to a group supported by the United States or opposed to it.

The Court finds this argument has no merit. Defendants are charged in Count 1 with conspiring to join and fight with ISIL; a designated FTO. To be designated an FTO, the organization must be involved in terrorist activities, which includes "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C.A. § 2656f (d)(2). The terrorist activities of ISIL have been widely reported, therefore there is nothing arbitrary or contrary to fundamental principles of justice as to ISIL's designation as an FTO. Further, because the victims of terrorism, by definition, involve noncombatants, there would be no situation in which a killing on behalf of ISIL would be legally justified.

As noted by the government, the issue of which group to support is a classic political issue, and the political question doctrine safeguards separation of powers by declining judicial review when another branch of government is authorized to speak with finality on the issue under consideration, or when there are no satisfactory criteria a court can use to make a judicial determination of the issue. Baker v. Carr, 369 U.S. 186, 210 (1962). Here, the Department of Defense and the State Department are authorized to speak with finality on the issue of which factions to support in a foreign country's internal conflict and there is no satisfactory criteria a court can use to make a judicial determination of the issue.

Defendants further argue that because Congress cannot criminalize mere membership in a foreign terrorist organization ("FTO"), a conviction of conspiracy to commit murder outside the United States requires proof of a defendant's knowledge of the FTO's illegal actions and a specific intent to further those illegal actions. See Scales v. United States, 367 U.S. 203, 220-222 (1961). As such, mere association with ISIL in the course of fighting in Syria cannot turn a killing during the course of combat against the Syrian government's army, or an act of self-defense, or an act in defense of others, into murder. The government must prove defendants had the specific intent to commit murder.

As noted above, defendants are charged with willfully conspiring with others to murder a person or persons outside the United States. It is thus clear that defendants have not been charged based solely on mere membership with ISIL.

III. Defendants' Joint Motion for Bill of Particulars and Leave to File Challenge to the Sufficiency of the Indictment

> The purpose of a bill of particulars is to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial , to avoid or minimize the danger of surprise at trial, and to enable hm to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite.

United States v. Hernandez, 299 F.3d 984, 989-90 (8th Cir. 2002).

Defendants move for a bill of particulars as to the charges in Count 1 pursuant to Federal Rules of Criminal Procedure 7(f). Defendants ask that the government be ordered to provide the following: 1) the identity of the individuals that were murdered; 2) the dates and locations of the murders; 3) the identity of the person or persons committing the murders; 4) the manner in which the murders were committed, such as information as to whether the victim was armed, wore uniforms and/or were engaged in combat; 5) if no one was murdered, the identity of the person or persons whose murder was the object of the conspiracy; and 6) the identity of the unindicted co-conspirators.

Defendants assert that none of the thirty-two overt acts listed in the

Indictment refer to discussions or plots to murder or kill anyone. They are thus left to guess as to who was murdered or who was the object of a conspiracy to murder. Defendants argue they are left to speculate about the basic facts underpinning this charge. Cf United States v. Al-Arian, 308 F. Supp.2d 1322, 1328 (M.D. Fla. 2004) (denying motion for bill of particulars because indictment detailed over 250 overt acts, ranging from soliciting and raising funds to numerous suicide bombings and attacks by PIJ members causing the deaths of over 100 people, including 2 American citizens, and injuries to over 350 people, including 7 American citizens).

The government responds that Count 1 of the Indictment alleges the commission of each element of the crime of conspiracy to commit murder outside the United States and provides defendants with a plain and concise description of the facts constituting the offense charged. Furthermore, the Indictment has been supplemented by voluminous discovery and by evidence adduced at several pretrial hearings.

The items of information sought by defendants in this motion are paradigmatic examples of the mis-use of a motion for bill of particulars to engage in discovery. For example, items one through five seek details about any murders the government alleges were committed or planned and item six seeks the identity of co-conspirators. These requests are not a proper use for a bill of particulars. See United States v. Huggans, 650 F.3d 1210, 1220 (8th Cir. 2011) (finding that a motion for bill of particulars is not a discovery device to be used to require the government to provide a detailed disclosure of the evidence that it will present at trial).

The Court finds that the Indictment tracks the language of the charging statute. Accordingly, the Indictment is legally sufficient. Sewell, 513 F.3d at 821. The Indictment also includes several allegations involving the charged conspiracy. For example, it alleges what type of car a co-conspirator rented and on what date, details which offices at which passports were applied for, and itineraries of co-conspirators. In addition, the discovery in this case provides additional information, and includes thousands of pages of documents, hours of tape-recorded conversations, video clips, evidence adduced at the pretrial hearings and the criminal complaints against other defendants including Abdi Nur, Abullahi Yusuf and Abdrizak Warsame. Accordingly, a bill of particulars is not warranted.

IV. Defendants' Joint Motion for Disclosure of De-Radicalization Evidence

and for Disclosure of Benefits to Government Witnesses

By this motion, defendants seek the following: 1) identity of government witnesses who are receiving or will receive de-radicalization counseling facilitated by the government or its agents; 2) the identity of those furnishing de-radicalization counseling; and 3) notes, reports and memoranda prepared by such individuals which contain statements of government witnesses.

Defendants also move for entry of an order directing the government to inquire and disclose all of the following within its possession, custody and control or the existence of which is known by the exercise of due diligence could become known to the government: 1) any and all consideration or promises of consideration given to or on behalf of the witness or expected or hoped for by the witness, including informal, direct or indirect promises of leniency or favorable treatment; 2) disclosure of such promises and benefits paid/made to each witness; and 3) clarification as to whether the relief sought is encompassed in paragraph 1 of the Court's September 3, 2015 Order.

This motion is made pursuant to the Jencks Act, Brady v. Maryland and/or Fed. R. Evid. 401 and 608(b)(1).

The government responds that it is aware of its legal obligations to make disclosures required by Brady, Giglio and the Jencks Act and will obey such obligations. As to the specific request for de-radicalization evidence, the government does not necessarily concede that any records of counseling sessions that may exist are within the government's possession, custody or control. Resolution of that issue is a necessary preliminary to any decision to disclose any records that may exist. The government has no objection to an order directing it to comply with the law.

V. Defendant Mohamed Abdihamid Farah's Motion to Join Co-defendants' Motions.

Defendant Farah "moves this Court for an Order allowing him to adopt all pretrial motions of the Co-Defendant(s) that are applicable to his cause to avoid duplication of effort and preserve judicial economy of time."

The government opposes this motion on the basis that Farah does not specify which of his co-defendants' motions he wishes to join and which he wishes to abstain from. Granting his motion would lead to confusion, as it would not be clear which motion apply to Farah. The government does not object to the mechanism of joining other defendants' motions, it does object to a motion like this one that does not identify the motions to be joined. Until Farah supplies the Court with a description of the specific motions he seeks to join, the government asks that the Court deny this motion.

The Court will grant the motion and allow Defendant Mohamed Farah to join the motions pending at this time.

IT IS HEREBY ORDERED:

1. Defendants' Joint Motion to Dismiss Count One of the Second Superseding Indictment [Doc. No. 352] is DENIED;
2. Defendants' Joint Motion to Dismiss Count One of the Second Superseding Indictment [Doc. No. 347] is DENIED;
3. Defendants' Joint Motion for Bill of Particulars [Doc. No. 348] is DENIED;
4. Defendants' Joint Motion for Disclosure of Evidence Related to De-Radicalization or Discovery of Information as part of Jencks Act Disclosures and for Disclosure of Benefits to Government Witnesses [Doc. Nos. 349 and 350] are GRANTED. The government must make disclosures as required by Brady, Giglio and the Jencks Act;
5. Defendant Mohamed Farah's Motions for Joinder [Doc. Nos. 353 and 365] are GRANTED;
6. Defendant Adnan Farah's Motion for Joinder [Doc. No. 355] is GRANTED; and

7. This matter is set for trial on Monday, May 9, 2016 at 9:00 a.m. in Courtroom 15E of the Minneapolis United States Courthouse. The parties are directed to follow the filing deadlines set forth in the Trial Notice [Doc. No. 322]. A hearing on any motions in limine filed will be held on Tuesday, April 26, 2016 in Courtroom 15E at 9:30 a.m.

Date: February 10, 2016

s/Michael J. Davis
Michael J. Davis
United States District Court